



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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Department of Natural Resources Comments on Senate Bill 357

Senate Committee on Environment and Natural Resources
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The Department has for the past 30 years implemented a limited entry policy in issuing Great Lakes commercial fishing licenses. SB 357 would eliminate the Department's authority to use minimum harvesting requirements as relicensing criteria.

The minimum catch requirement serves two important purposes -- preventing Wisconsin from moving towards a property-rights based commercial fishery and helping the Department maintain an economically viable and stable commercial fishery. We understand that some commercial fishers are having a hard time meeting the annual minimum harvest requirements, but feel there must be some minimum requirements in place. **While we already routinely grant hardship exceptions to the minimum harvest requirements, we are certainly willing to look at alternatives to the current minimum harvest standards.** In fact, we have already begun the rule-making process to look at other ways of addressing this issue, and hope to continue to work with commercial fishing interests on these changes. In meetings between DNR administration and industry representatives this past summer, several alternatives were discussed including species specific or several year running average minimum catch alternatives. There may be other viable alternatives that would arise through the public hearing process. The approved Rule Agenda/Board Action Checklist specifies holding public hearings in May, 2008.

We fear that in the absence of meaningful relicensing criteria, the commercial harvest of fish would take on the nature of a legal right and the State would lose the ability to regulate commercial fishing without compensating commercial fishers.

History

The Department has used minimum fishing effort or catch requirements, minimum investment in gear, residency, age, and other factors to identify qualified applicants for relicensing as Great Lakes commercial fishers. Initially, one key requirement was minimum fishing effort, or the number of days per year during which a licensee lifted nets. In 1989, that criterion was replaced with the minimum catch requirement in order to satisfy the commercial fishing industry needs. Unless prevented by unavoidable circumstances, to qualify for annual relicensing a Lake Michigan licensee must 1) harvest a specified minimum poundage of all species taken from one of three geographic zones or 2) harvest an amount exceeding 30 times the average daily harvest of all species from one of the zones in one year. This is a low threshold, and very few license renewal applications have been denied for failure to meet the minimum catch requirement.

DNR's minimum catch requirement allows for case-by-case hardship exceptions. DNR uses the "unavoidable circumstances" exception nearly every year to excuse applicants who failed to make the minimum catch due to a wide variety of problems, ranging from poor health of a dependent to poor fishing.

Property Rights

In the 1990s, the State overcame court challenges by Wisconsin commercial fishers who argued that they have a constitutionally protected property right in their licenses and quotas, and accordingly that DNR can't change the commercial fishing rules without compensating them first. We are afraid that if the minimum harvest requirements are repealed as AB 634 seeks to do, a similar court challenge might have a different result.

In *LeClair v. Natural Resources Board*, 168 Wis. 2d 227 483 N.W.2d 278 (Ct. App. 1992), six licensed Wisconsin commercial fishers contended that a DNR rule revision constituted a "taking" of their property, entitling them under the U.S. and Wisconsin Constitutions to contested-case hearings and other procedural due process requirements before the right may be taken away – **and to compensation for the taking**. The plaintiffs claimed entitlement to the right to be issued renewed Lake Michigan forage fish trawling permits each year with the same quotas as their existing permits.

The Court of Appeals ruled that the plaintiffs did not have a private property right. The court's decision relied heavily on the fact that Wisconsin does not issue licenses "as a matter of course," meaning that there are some requirements associated with the license. **A key provision preventing licenses from becoming "a matter of course" is the minimum harvest requirement.**

The Court of Appeals reasoned that "the statutes giving the department wide regulatory authority over the natural resources, fish and game of Wisconsin, and the absence of anything in the permits themselves, or the laws and rules under which they were issued, to indicate that renewal was a mere formality and would be done simply as a 'matter of course' each year . . ." (Underline added) would preclude the plaintiff's from claiming a private property right.

The clear implication of the Court's reasoning is that a property right may be created in a license or permit if the license or permit is renewed as a matter of course or as a matter of right. Under current DNR rules, Lake Michigan commercial fishing licenses and permits are not renewed as a matter of course. Instead, to qualify for annual renewal, each commercial fisher must show that he or she caught the minimum poundage of fish specified by rule. The Court agreed with DNR that licenses and the associated quota permits are not personal entitlements or rights under Wisconsin's limited entry commercial fishing licensing system.

We are concerned that if the minimum harvest requirements were eliminated and this was again challenged in court, the decision might be different. If licenses and quotas were private property, any DNR rule change that might reduce the commercial harvest, increase the cost of operation or otherwise affect the productive value of a license would first have to be compensated for by the government, since it would be a regulatory "takings". Rules that set harvest limits, gear restrictions, recordkeeping and reporting requirements, closed areas and other constraints all have economic impacts on the value of commercial fishers' licenses and quotas. If a court made a different decision on this case, DNR would not be able to modify the commercial fishing rules as needed to protect the fishery from overharvest or remedy user conflicts between sport anglers and commercial fishers without being prepared to compensate commercial fishers for "taking" of this private property.

Conclusion

We also want to help those commercial fishers who are having a hard time meeting the current minimum harvest requirements, and we remain poised to work with those interests on alternative requirements that will help without potentially creating a private property right. We have already begun a rule-making process to consider making changes, and would hope to work with the commercial fishers to make this a workable system for everyone.



Wisconsin Commercial Fisheries Association

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To: Natural Resources Committee Members

Fr: Charlie Henriksen, President Wisconsin Commercial Fishers Assoc.

Re: Support for SB357

Date: February 7, 2008

As part of an effort to streamline and protect the commercial fishery in Wisconsin in the 1980's many revisions were made to how licenses are issued and the fishery was managed. These provisions to fully implement a limited entry system were both complex and difficult.

The limited entry system has accomplished its goals by reducing user conflict and consolidating the fishery. What hasn't happened is a stabilization of the stocks-the lake and bay is very dynamic and affected, usually more severely, by natural changes and invasive species in addition to sport and commercial harvests.

In the early stages of this regulation (when there were over 200 licenses) it was necessary to identify inactive licenses and the tool used to do this was MINIMUM PRODUCTION levels, which required a certain harvest level per license in order to be annually renewed. In the current fishery with less than 60 licenses there is no need to identify inactive licenses. In fact we should be looking for ways to protect the remaining fishers.

With the catastrophic failure apparently decimating chub stocks lakewide, perch fishing closed in Lake Michigan, reduced perch quotas in Green Bay, poor smelt fishing and even more invasive species coming from all directions, licenses may be forced to lower harvest levels.

The current economic climate with huge increases in costs, including fuel, insurance and health care, no one is keeping licenses that are not necessary. Please support SB357 to eliminate the antiquated minimum production requirement for commercial fishers. We are far past a time where we need to eliminate licenses. The great state of Wisconsin should be looking for ways to preserve and protect its commercial fisheries which provide vital jobs and give all people of Wisconsin access to their natural resources and a healthy and local food source. Thank you.

